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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1113

UNION CARBIDE CORPORATION,

Petitioner,

—against—

MARINA VOUTSIS,

Respondent,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I.

The memorandum submitted by EEOC and relied upon by respondent[1] predicates its main opposition to the petition herein upon a protestation that there is in fact no conflict between the decision below and the line of Sixth Circuit decisions headed by *Dewey* v. *Reynolds Metal Co.*[2] The attempted denial does not withstand analysis.

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[1] The Court was evidently notified of such reliance by a letter from respondent's counsel dated April 24, 1972.

[2] 429 F.2d 324 (6th Cir. 1970), *cert. granted*, 400 U.S. 1008 (1971), *aff'd per curiam without opinion*, 402 U.S. 689; *Spann* v.

The EEOC extracts and pinpoints the phrase "totally complete" from the following paragraph in *Spann*:

> "We hold only that where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete *Dewey* precludes judicial cognizance of the complaint."

It then suggests that the State agency proceedings herein asserted as a bar were not "totally complete" prior to the commencement of the district court action and presumably, therefore, the decision below is not in conflict with the *Dewey, Spann* and *Newman* decisions of the Sixth Circuit.

But the State agency proceedings here *were* "totally complete" when the district court action was commenced and in precisely the same sense in which the Sixth Circuit used that phrase. A decision of the Sixth Circuit dated March 3, 1972 (*Thomas* v. *Carey Mfg. Co.*, —— F.2d ——, 4 FEP Cases 468) emphasizes this fact and drives home with added force the showing of conflict made in the petition herein at pages 11-14.

The principal operative fact relied on by the court in *Thomas* to bar the Title VII action there was that "the filing of the action in the District Court was preceded by the filing and processing of a grievance through the arbitration proceeding provided by the collective bargaining agreement" between the parties. Thus the Sixth Circuit found that the conduct of the arbitration proceeding to decision was sufficient to bar any subsequent federal court action predicated on the same claim.

Kaywood Div., Joanna Western Mills Co., 446 F.2d 120 (6th Cir. 1971); *Newman* v. *Avco Corp.*, 451 F.2d 743 (6th Cir. 1971). See also *Thomas* v. *Carey Mfg. Co.*, —— F.2d ——, 4 FEP Cases 468 (1972).

The facts at bar present a parallel situation. It is undenied in EEOC's memorandum that by the time the district court action was commenced on August 10, 1970 (1) the respondent's discrimination claim at the State agency had been settled by the execution of a stipulation by the parties on August 12, 1969, (2) the settlement had been embodied in a formal order of the agency's Commissioner on September 23, 1969, and (3) the Company had complied in all major respects with said order and settlement on November 19, 1969.[3] All State proceedings which occurred subsequent to November 19, 1969, were triggered by respondent's refusal to accept the Company's compliance with its obligation under the settlement (fulfilled on November 19, 1969) to make an offer to respondent of a job of the kind described therein. Thus it is clear that the State agency proceedings on respondent's discrimination claim against Union Carbide were "totally complete" prior to the institution of the federal court action on August 10, 1970.[4]

II.

In the short period between the filing of the petition herein and the service of the memorandum in opposition, at least two additional court decisions were reported con-

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[3] As noted both by the EEOC in its memorandum and by Union Carbide in its petition, the Company was later found in violation of the settlement for a limited period between September 11, 1969 and November 19, 1969. The State agency, however, awarded damages to respondent for that limited period and the Company has tendered performance of that obligation.

[4] Respondent's rejection of the Company's job offer and back pay tender made in compliance with the parties' settlement and the enforcement order of the State agency is indistinguishable from the grievants' rejection of the arbitrators' awards in *Spann* and *Thomas*.

cerning the application of the doctrines of collateral estoppel, election of remedies, or *res judicata* in Title VII suits. These decisions serve to widen the already existing conflicts among the courts in this area and to make even more urgent their resolution by this Court. The Sixth Circuit's decision in *Thomas*, discussed above, was one of them. The other is a decision by the United States District Court for the Western District of Tennessee. *Taylor* v. *Springmeier Co.*, —— F. Supp. ——, 4 FEP Cases 322 (1971). There the court held that a Title VII action based on an alleged discriminatory discharge of a Negro employee was barred under the doctrine of election of remedies since the discharged employee's grievance was finally determined adversely to him after a full hearing by a grievance committee.

In this connection it is significant, we submit, that the existence of the conflicts discussed in the petition herein (pp. 14-18) between the court below and other federal courts in applying the doctrines of election of remedies and *res judicata* in Title VII cases is not challenged or disputed by the EEOC in its memorandum.[5]

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[5] The case of *Jenkins* v. *United Gas Co.*, 400 F.2d 28 (5th Cir. 1968), cited by EEOC in its memorandum, serves, if at all, only to highlight the conflict among the circuits. That case involved the issue of mootness and did not anywhere in the court's holding or in dicta touch upon the issues involved herein of collateral estoppel, election of remedies and *res judicata*. But to the extent EEOC would have us read that case to require the continuation of a federal court proceeding under Title VII in a case where the underlying discrimination claim had been disposed of *prior* to the commencement of the federal court action, as it had been here, it is in direct conflict with the Sixth Circuit's decisions in *Dewey, Spann, Newman* and *Thomas* and with the district court decisions discussed on pages 14-17 of the petition herein.

Moreover, the memorandum in opposition implicitly recognizes the force of the Company's argument that pursuit of federal remedies in cases such as the one at bar discourages and subverts voluntary settlements and tends to cast the burden of litigation in this field on the federal courts (Mem. in Opp., p. 5). The EEOC, however, seeks to sweep this argument aside by suggesting that this result will not flow from the decision hereinbelow because the settlement in this case was "vague," not "consummated" or "unresolved"; and the remedy was not "effective" or "found wanting"; and the State had not provided "prompt" or "complete relief."

These characterizations cannot hide the plain facts, undisputed and undenied in EEOC's memorandum, that prior to federal court action a settlement of the discrimination claim was voluntarily made by the employee, that she had obtained enforcement of that settlement by the State agency and that the agency has found, after an adversary hearing, that the Company had complied with the settlement by its job offer made on November 19, 1969. To the minor extent that it had not, damages were awarded and their payment to respondent was tendered.

Surely the need for an authoritative resolution of the conflicts we have pointed out is presented by this case. And an authoritative determination as to whether the floodgates of duplicative and second-chance litigation—already foreshadowed in the proliferating lawsuits discussed in this application—seems likewise urgently needed.

CONCLUSION

For these reasons and those set forth in the petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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